APPENDIX A

In re UNITED STATES of America, Petitioner.

No. 520, Docket 93-3074.

United States Court of Appeals,
Second Circuit.

Argued Sept. 3, 1993.

Decided Nov. 23, 1993.

Before: FEINBERG, CARDAMONE and ALTIMARI, Circuit Judges.

FEINBERG, Circuit Judge:

The United States petitions under the All Writs Act, 28 U.S.C. § 1651, and Rule 21 of the Federal Rules of Appellate Procedure for a writ of mandamus to the United States District Court for the Eastern District of New York, Edward R. Korman, J. The petition requests a determination of the authority of a district court to delegate to a federal magistrate judge the power to review applications by law enforcement officials for orders authorizing electronic eavesdropping pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2521 (Title III). The petition requests, in the alternative, an order directing respondent Judge Korman to review such applications personally. For the reasons set forth below, we grant mandamus and order respondent Judge Korman not to delegate review of Title III applications to federal magistrate judges and to review personally an application now pending.

I. Background

In February 1992, respondent Judge Korman was serving in the Miscellaneous Part of the district court, where he was responsible for the review of applications for Title III orders. By an opinion and order dated February 14, 1992, respondent

announced his intention to refer all such applications to United States magistrate judges. *See In re United States Attorney*, 784 F.Supp. 1019, 1028 (E.D.N.Y.1992). At the request of the United States, however, Judge Korman stayed implementation of his order until October 10, 1992[1] and signed the then pending Title III application of the United States Attorney for the Eastern District of New York. The United States then petitioned this court for mandamus review of Judge Korman's order. This court denied the petition in an order dated March 23, 1993. Upon the United States' motion for clarification, the order was modified on June 14, 1993 to state that the petition was denied because no application had been referred to a magistrate.

On June 30, 1993, Judge Korman referred another application by the United States Attorney to a magistrate judge. The United States now seeks mandamus review of this order. This court accepted briefs from the parties and heard oral argument.[2]

II. Availability of Mandamus

This court's order of March 23, 1993, as modified June 14, 1993, denied petitioner's earlier mandamus petition because there was no wiretap application then pending before a magistrate judge. Because such an order is now pending, the issue has become ripe for review.

Mandamus is an extraordinary remedy that this court does not grant lightly:

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[1] This was the next date on which respondent expected to serve in the Miscellaneous Part.

[2] Because the issues were fully briefed at the time of the prior application for mandamus, the parties resubmitted and relied upon those briefs.

> the petitioner must show (1) the presence of a novel and significant question of law; (2) the inadequacy of other available remedies; and (3) the presence of a legal issue whose resolution will aid in the administration of justice.

In re United States, 903 F.2d 88, 89 (2d Cir.1990) (citing *In re Von Bulow*, 828 F.2d 94, 97-100 (2d Cir.1987)). We find that the petition by the United States meets these stringent criteria.

First, the case presents a novel and significant issue. Respondent appears to be the only judge in this circuit, if not in the nation, to delegate the review of Title III orders to a federal magistrate judge. As for significance, this court has recognized that "the scope of a Magistrate's authority is a significant issue in federal criminal litigation." *In re United States*, 903 F.2d at 89. Moreover, the disposition of applications for wiretapping orders implicates serious issues of privacy under the Fourth Amendment.

Second, petitioner has no alternative remedies capable of effectively protecting its substantial interests. Electronic surveillance involves major criminal investigations and requires a significant expenditure of government resources. Petitioner thus has a strong interest in ensuring the admissibility of evidence it gathers by electronic surveillance. Suppression on the ground that surveillance was authorized by an invalid Title III order would result in a significant waste of government resources. Furthermore, the government as *parens patriae* has an interest in avoiding illegal invasions of its citizens' privacy.

Moreover, because of the unusual procedural posture of this proceeding, petitioner has no other adequate remedy. If petitioner is unable to obtain review of the basic legal issue now, presumably either the pending Title III application or another one referred by respondent to a magistrate in the future will be approved by a magistrate and petitioner will

proceed with a criminal investigation. If an indictment results, the defendant, of course, would have the right to move to suppress any evidence obtained through the wiretap. Petitioner would then be placed in the impossible situation of either agreeing with defendant that the wiretap was not properly authorized or of taking a legal position that it believes is incorrect. Cf. *In re United States*, 903 F.2d 88.

Finally, resolution of this issue will aid in the administration of justice. Mandamus is appropriate "when the appellate court is convinced that resolution of an important, undecided issue will forestall future error in trial courts, eliminate uncertainty and add importantly to the efficient administration of justice." *In re Von Bulow*, 828 F.2d at 99 (quoting *Colonial Times, Inc. v. Gasch*, 509 F.2d 517, 524 (D.C.Cir.1975)). In this case, mandamus will eliminate uncertainty as to the delegation of Title III review, thus avoiding future challenges to wiretapping orders approved by magistrate judges, which may require retrial or the suppression of evidence.

III. The Merits

We turn now to the merits of the case. Whether district judges may delegate the review of Title III orders to magistrate judges depends ultimately upon the congressional intent expressed in Title III and in the Federal Magistrates[3] Act, Pub.L. No. 90-578, 82 Stat. 1107 (codified as amended at 28 U.S.C. §§ 631-639). In analyzing this issue, however, another statute is highly relevant, as will be seen below.[4]

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[3] In 1990, the name of the office of United States magistrate was changed to "United States magistrate judge." This opinion uses the terms interchangeably.

[4] The parties have not raised, nor do we address, any constitutional issues involved in the delegation of Article III judges' duties to magistrate judges. We note that the Supreme Court has avoided

A. *Relevant statutes*

The 90th Congress enacted Title III in June 1968. The statute requires law enforcement officers seeking permission to intercept wire, oral or electronic communications to apply in writing to a "judge of competent jurisdiction." 18 U.S.C. § 2518(1). The statutory definition of that term includes only "a judge of a United States district court or a United States court of appeals" and "a judge of any court of general criminal jurisdiction of a State," who is authorized by state law to enter wiretapping orders. 18 U.S.C. § 2510(9). Title III contains a number of provisions designed to tightly control the use of this prosecutorial tool and to safeguard the privacy interests of those subjected to a wiretap. See generally *United States v. Giordano*, 416 U.S. 505, 514-23, 94 S.Ct. 1820, 1826-30, 40 L.Ed.2d 341 (1974). For example, an application for a wiretap order must be authorized by the Attorney General or her designees, see 18 U.S.C. § 2516(1), and must be made in writing, under oath, with a statement of the applicant's authority. See 18 U.S.C. § 2518(1)(a). It must also include the identity of the law enforcement officer making the application and provide a complete statement of the facts relied upon. See 18 U.S.C. §§ 2518(1)(a)-(e). Furthermore, the right to intercept is confined to seeking evidence of only certain specified serious offenses. See 18 U.S.C. § 2516(1)(a)-(o). In addition, there are stringent restrictions on the use and disclosure of the evidence obtained. The statute specifies safeguards relating to recording, minimizing and sealing the interceptions, as well as notice requirements to intercepted parties. 18 U.S.C. § 2518(8)(a), (b), (d). Violations of 18 U.S.C. §§ 2510 et seq. are

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constitutional issues in this area by construing the Federal Magistrates Act narrowly "in light of its structure and purpose." *Gomez v. United States*, 490 U.S. 858, 864, 109 S.Ct. 2237, 2241, 104 L.Ed.2d 923 (1989) (citing cases).

punishable by imprisonment of up to five years and a fine of $10,000. 18 U.S.C. §§ 2511(4)(a), 2512(1).

The Federal Magistrates Act was enacted in October 1968 during the same session in which Congress enacted Title III. The statute replaced the office of United States commissioner with that of federal magistrate and gave the latter all the powers theretofore exercised by the former. See Pub.L. No. 90- 578, § 636(a)(1) (codified at 28 U.S.C. § 636(a)(1)). In addition, the statute specifically listed further powers of the newly created magistrates. See id. at §§ 636(a)(2) and (3) (codified as amended at 28 U.S.C. §§ 636(a)(2) and (3)). Commissioners had not been authorized to issue Title III orders, and the list enumerating powers of magistrates did not include any reference to the Title III wiretap approval procedure Congress had just created a few months before. The statute did, however, authorize a district court to assign to magistrates "such additional duties as are not inconsistent with the Constitution and laws of the United States," id. at § 636(b), including but not restricted to "assistance to a district judge in the conduct of pretrial ... proceedings in ... criminal actions." Id. at § 636(b)(2).

In 1976, the Magistrates Act was amended to expand the powers of magistrates. Section 636(b) was changed to read, in relevant part, as follows:

(b)(1) *Notwithstanding any provision of law to the contrary--*

> (A) a judge may designate a magistrate to hear and determine *any pretrial matter* pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action.

. . . . .

(3) A magistrate may be assigned *such additional duties as are not inconsistent with the Constitution and laws of the United States*. (emphasis supplied).

Pub.L. No. 94-577, 90 Stat. 2729 (codified as amended at 28 U.S.C. § 636(b)).

Finally, in 1986, Congress passed the Electronic Communications Privacy Act of 1986, Pub.L. No. 99-508, 100 Stat. 1848 (codified as amended at 18 U.S.C. §§ 3121-3127) (the Privacy Act). This Act amended Title III by requiring law enforcement officers wishing to employ "pen register" or "trap and trace" monitoring devices[5] to seek permission from a "court of competent jurisdiction." See 18 U.S.C. § 3122(a). Unlike the definition of "judge of competent jurisdiction" in the wiretapping provisions of Title III, the definition of "court of competent jurisdiction" in the Privacy Act specifically includes federal magistrates. See 18 U.S.C. § 3127(2)(A).

In contrast to the provisions of Title III regarding wiretaps, a pen register or trap and trace application does not require authorization from the Attorney General or her designee. The application need only identify the applicant and the investigating law enforcement agency and certify that "the information likely to be obtained is relevant to an ongoing criminal investigation being conducted by that agency." 18 U.S.C. § 3122(b)(2). The provision was not intended to require independent judicial review of relevance; rather, the reviewing court need only verify the completeness of the certification. See S.Rep. No. 541, 99th Cong., 2d Sess. 47 (1986), reprinted in 1986 U.S.C.C.A.N. 3555, 3601. Moreover, the maximum prison term for violation of the pen

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[5] These devices are used to identify numbers dialed to or from a telephone, but do not allow eavesdropping on conversations.

register or trap and trace provisions is only one year, 18 U.S.C. § 3121(c), compared to the five-year prison term authorized for violation of the wiretap provisions of Title III. 18 U.S.C. § 2511(4)(a).

B. *Discussion*

Petitioner United States argues that magistrates have not been authorized to approve wiretapping orders, either by Title III or by the Magistrates Act, as first enacted in 1968, or by the 1976 amendment of § 636(b). Petitioner is aware, of course, that as far back as 1968, district courts could assign to a magistrate "such additional duties as are not inconsistent with the Constitution and laws of the United States," including assisting the judge in pretrial proceedings in criminal cases, and that since 1976 such assignment has been permissible "in any pretrial matter" (with specified exceptions not applicable here), "notwithstanding any provision of law to the contrary." Petitioner argues, however, that this general language does not allow the delegation to magistrates at issue here. Petitioner emphasizes that Title III, as initially passed in 1968, specifically gave the power to approve wiretap applications only to federal district judges, federal circuit judges and state judges empowered by state statute to issue eavesdropping orders and that the 1986 Privacy Act amended the definition section of Title III, 18 U.S.C. § 2510, in many respects but not with respect to the issue raised here.

These are strong arguments. The Privacy Act explicitly authorized magistrates to approve pen register and trap and trace methods of surveillance, but failed to amend Title III specifically to authorize magistrates to approve wiretapping orders. If Congress in 1986 had believed magistrates to be "judge[s] of competent jurisdiction," as the term is used in Title III, 18 U.S.C. § 2510(9), who are authorized to issue wiretapping orders, then the Privacy Act could have empowered magistrates to issue pen register orders with a simple reference back to § 2510(9). Instead, however, the 1986

Privacy Act specifies persons empowered to authorize pen register orders by reference to a separate "court of competent jurisdiction" section, which, unlike § 2510(9), specifically includes magistrates. See 18 U.S.C. § 3127(2)(A).

In response, respondent argues primarily that the 1976 amendment to the Magistrates Act authorized a district judge to delegate "any pretrial matter"[6] (with specified exceptions not applicable here) to a magistrate, "notwithstanding any provision to the contrary." Respondent points to the House Report on the 1976 amendment, which stated that the language just quoted "is intended to overcome any problem which may be caused by the fact that scattered throughout the code are statutes which refer to 'the judge' or 'the court' " and that therefore "the permissible assignment of additional duties to a magistrate shall be governed by the revised section 636(b), 'notwithstanding any provision of law' referring to 'judge' or 'court'." H.R.Rep. No. 1609, 94th Cong., 2d sess. 9 (1976), reprinted in 1976 U.S.C.C.A.N. 6162, 6169. With regard to the 1986 Privacy Act, respondent claims that it specifically authorized magistrates to approve pen registers and not wiretapping because the 1986 Act, unlike the original Title III, post-dated both the Magistrates Act and the amend-

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[6] While we assume arguendo that the review of Title III wiretapping orders is a "pretrial matter" within the meaning of 28 U.S.C. § 636(b)(1)(A), it is at least arguable that this is not so because the review may occur long before any proceeding in court. This, of course, may also be true of applications for a search warrant, which magistrates are undoubtedly authorized to issue. See Fed.R.Crim.P. 41(a). But that power does not stem from the 1976 amendment of the Magistrates Act, upon which respondent so heavily relies. Rather, search warrant authority resided with United States commissioners, the predecessors of federal magistrates, since before the 1968 Magistrates Act. See S.Rep. No. 1097, 90th Cong., 2d sess. (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2179 (citing former 18 U.S.C. § 3041 (1964)).

ment of that Act in 1976. The Privacy Act's amendments in 1986 of the definitions in Title III did not authorize magistrates to issue wiretapping orders, respondent argues, because the 1976 Magistrates Act had already done so.

These are substantial arguments, particularly the former which relies on the 1976 amendment to the Magistrates Act. Yet, we are left with the strong conviction that Title III is sui generis and that any Congressional expansion of the list of those officers authorized to approve wiretaps would be specific rather than general and indirect. It must be remembered that Congress passed Title III in 1968 only after "a long battle between those who would have altogether prohibited wiretaps and the material obtained thereby and those who wanted to allow the government to use wiretap material in criminal prosecutions." United States v. Gerena, 869 F.2d 82, 84 (2d Cir.1989) (citing *National Broadcasting Co. v. United States Dept. of Justice*, 735 F.2d 51, 53 (2d Cir.1984)). Title III was not enacted simply to facilitate electronic surveillance by law enforcement agencies. To the contrary, this court has noted that because "Congress recognized that wiretapping could be highly intrusive of privacy," the statute placed strict limits on the use of wiretapping. *Gerena*, 869 F.2d at 84; see also *National Broadcasting Co.*, 735 F.2d at 53 (citing S.Rep. No. 1097, 90th Cong., 2d Sess. 67, 161-65, reprinted in 1968 U.S.C.C.A.N. 2112, 2154-56, 2222-27). Title III was intended to "properly protect the privacy of oral and wire communications, while providing a uniform basis for authorizing their interception in appropriate cases." *United States v. Bianco*, 998 F.2d 1112, 1120 (2d Cir.1993).

In view of this background, the interaction between Title III and the 1986 Privacy Act supports our view that magistrates have not been authorized to approve wiretap applications under Title III. It is significant that the Privacy Act changed the definition section of Title III in many respects, but did not alter § 2510(9), which grants the power to

approve wiretaps only to federal Article III judges and state judges having general criminal jurisdiction and state statutory authorization. It is also significant that the 1986 Act specifically authorized magistrates only to approve pen register and trap and trace monitoring, invasions of privacy far less intrusive than wiretapping. There is a sharp contrast between the stringent controls over wiretap orders (including the severity of punishment enforcing them) and the much less onerous conditions for obtaining pen register and trap and trace authorization. We believe that Congress in 1986 saw pen register and trap and trace monitoring, which magistrates may authorize, to be qualitatively different from wiretapping, which only an Article III federal judge or a state court judge of general criminal jurisdiction may authorize.

Respondent relies heavily on this court's decision in *United States v. Diaz*, 922 F.2d 998 (2d Cir.1990), cert. denied, --- U.S. ---, 111 S.Ct. 2035, 114 L.Ed.2d 119 (1991), in support of the view that the order under attack here is valid. In that case, we interpreted the "notwithstanding" language in the 1976 amendment of the Magistrates Act as implicitly authorizing magistrates to empanel grand juries, even though the Jury Selection and Service Act, 28 U.S.C. § 1865(a), gives that authority only to district judges. *Diaz*, 922 F.2d at 1002. *Diaz*, however, did not involve the important privacy interests affected by Title III.

The purpose and legislative history of Title III suggest caution in allowing delegation of authority conferred by that statute. The Supreme Court relied on such a view of Title III in *United States v. Giordano*, 416 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974), a case strikingly similar to the case at hand. *Giordano* involved 18 U.S.C. § 2516(1), which then provided that "the Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application" for a wiretap order. The Court held that § 2516 did not allow the Attorney General to delegate the power to authorize applications to the

Attorney General's Executive Assistant, even though the Attorney General was authorized by a different statute to delegate any of her functions to "'any other officer, employee, or agency of the Department of Justice.'" Giordano, 416 U.S. at 513, 94 S.Ct. at 1826 (quoting 28 U.S.C. § 510).

Just as Title III empowers "a judge of competent jurisdiction" to review applications, 18 U.S.C. § 2518(1), it empowers the Attorney General to authorize applications. See 18 U.S.C. § 2516(1). And, just as 28 U.S.C. § 636(b), the 1976 amendment of the Magistrates Act, allows district judges to delegate "any pretrial matter" and "additional duties," 28 U.S.C. § 510 allows the Attorney General to delegate any of her functions. The *Giordano* Court held, nonetheless, that even though Title III included no "precise language forbidding delegation ...[,] § 2516(1), *fairly read*, was intended to limit the power to authorize wiretap applications to the Attorney General himself and to any Assistant Attorney General he might designate." 416 U.S. at 514, 94 S.Ct. at 1826 (emphasis supplied).

The *Giordano* Court based its holding on the purpose and the legislative history of Title III, fairly read. The same approach also supports the view that Congress wanted to limit the power to review applications to specified judicial officers.[7] The purpose of Title III was to outlaw wiretapping except in certain situations, as indicated by the strict restrictions on the gathering and use of wiretap evidence. See id.

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[7] Respondent has attempted to distinguish Giordano on the ground that the Attorney General's power to delegate authority under 28 U.S.C. § 510 predated Title III, while the Magistrates Act post-dated Title III. See *In re U.S. Attorney*, 784 F.Supp. at 1022. Thus, it could be argued that § 510 could not empower the Attorney General to delegate her Title III authority, because when § 510 was enacted, she had no Title III authority. *Giordano*, however, did not rely upon, or even mention, the timing of § 510. Rather, it relied entirely on a close examination of Title III.

at 514-16, 94 S.Ct. at 1826-27. Those statutory restrictions should be observed in the absence of specific Congressional direction to the contrary.

The present case also stands in contrast to our recent decision in *Austin v. Healey*, 5 F.3d 598 (2d Cir.1993), in which we approved a court rule automatically delegating extradition proceedings to magistrate judges. That case involved neither privacy issues nor judicial inference as to Congressional intent, for Congress has specifically stated that magistrates may hear extradition proceedings if "'authorized so to do by a court of the United States.'" *Id.*, at 601 (quoting 18 U.S.C. § 3184). Furthermore, before the Magistrates Act, Congress had authorized extradition proceedings, unlike wiretap applications, to be heard by United States commissioners, id., at 603, so that the Magistrates Act in that respect merely codified prior practice.

It may also be argued that since magistrates have the authority to issue search warrants, which obviously intrude upon privacy interests, Congress must have intended in the 1976 amendments to the Magistrates Act to allow magistrates to approve wiretap applications. But here, too, United States commissioners were empowered to issue search warrants even before Title III was enacted, see supra n. 6, so that no such inference is justifiable. Indeed, the Senate Report on the legislation that became Title III specifically pointed out that the prior practice of commissioners with regard to such warrants had been "too permissive for the interception of wire or oral communications," and that the power to authorize electronic surveillance should be more limited. S.Rep. No. 1097, reprinted in 1968 U.S.C.C.A.N. 2112, 2179.

Our dissenting brother asserts that a wiretap is not "more intrusive on personal privacy" than a judicially-authorized search. We disagree. A wiretap may capture the intimate details of a person's life over an extended period of time without that person's knowledge. In contrast, a search

pursuant to a warrant, which has long been a recognized tool of the prosecutor, occurs just once and, by its nature, puts the person searched on notice of the violation of privacy. A wiretap is like a continuous film of events in your home, secretly recorded over a period of weeks or months. A search is like a surprise snapshot of your home taken in your presence. The former is obviously a far greater invasion of privacy than the latter. The lengthy battle in the 1960's leading to enactment of Title III is proof enough that Congress considered the comparatively new technique of electronic eavesdropping to be far more intrusive than the familiar search pursuant to a warrant.

Finally, we do not doubt that the 1976 amendment of the Magistrates Act was intended, as respondent urges, to overcome a series of court decisions that had construed that Act narrowly to limit the "additional duties" that could be delegated to magistrates. H.R.Rep. No. 1609, reprinted in 1976 U.S.C.C.A.N. 6162, 6164-67, 6173. But one can search the House Report in vain for disapproval of a decision refusing to allow a magistrate to hear wiretap applications. Indeed, apparently no one thought that the power existed, since even respondent concedes that no district judge has ever delegated the review of a Title III application to a magistrate before.

In enacting the 1968 Magistrates Act, the 1976 amendment to that Act and the 1986 Privacy Act amendments to Title III, Congress had multiple opportunities to add magistrate judges specifically to the category in Title III of "judge of competent jurisdiction," but in each instance did not do so. We are aware of the growing burdens placed upon the district courts and appreciate the valuable assistance furnished to the judicial system by magistrate judges. But in enacting Title III, Congress showed great concern for protecting individual privacy against the vast potential for intrusion posed by wiretapping. In sum, we are unwilling, in the absence of explicit statutory direction, to expansively interpret Title III's

definition of a "judge of competent jurisdiction," 18 U.S.C. § 2510(9), to include magistrate judges.

Mandamus granted.

CARDAMONE, Circuit Judge, dissenting:

The majority concludes that the Federal Magistrates Act does not authorize district courts to refer electronic eavesdropping applications, made under Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-2521 (Title III), to a United States magistrate judge. In effect, the majority asks "why" should the magistrate judges have this authority. Were Congress asked this question, and it is that body's legislative purpose which purports to be our guide, its answer would be, I am persuaded, "why not?" While the issue presents a close question of statutory interpretation, clearly the statutory scheme, the genealogy of Title III amendments, and the legislative history of the Magistrates Act, Pub.L. No. 90-578, 82 Stat. 1107 (codified as amended at 18 U.S.C. §§ 3401-02; 28 U.S.C. §§ 631- 39 (1988)), make plain the legislative aim to experiment in the broader use of magistrate judges in order to free Article III judges to perform their adjudicatory function. For reasons stated in a moment, I therefore respectfully dissent.

DISCUSSION

I

It is plain that Congress was deeply concerned about individual privacy rights as reflected in the debates leading up to the enactment of Title III in June 1968. Once Congress decided to authorize this intrusion through the use of a wiretap, the issue of privacy was resolved and the only question that remained was which judicial officers would have the authority to order a wiretap. It is our differing views on the answer to that question that prompts this dissent.

The statute, 18 U.S.C. § 2518(1), requires all wiretap applications to be submitted in writing to a "judge of competent jurisdiction," defined as: "(a) a judge of a United States district court or a United States court of appeals; and (b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter [wiretap] orders." 18 U.S.C. § 2510(9).

At the time § 2510(9) was drafted and enacted, Congress could not have included magistrates in the definition because magistrates did not then exist. Commissioners, who were not required to be lawyers, were their ostensible equivalent, and Congress did not deem commissioners capable of judiciously reviewing wiretap applications. See S.Rep. No. 1097, 90th Cong.2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2179. In fact, Congress did not believe commissioners were competent in the duties they were authorized to perform, such as review of applications for and authorization of search and arrest warrants. *See* H.R.Rep. No. 1629, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 4252, 4255-56.

In response to this perceived inadequacy, four months after the passage of Title III, Congress enacted in October 1968 the Federal Magistrates Act. With the creation of the office of the United States magistrate, Congress abolished the office of commissioner. Magistrates were vested with all the authority previously held by commissioners, along with greatly expanded duties designed to "increase[ ] the overall efficiency of the Federal judiciary, while at the same time providing a higher standard of justice at the point where many individuals first come into contact with the courts." H.R.Rep. No. 1629, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 4252, 4257.

To address the deficiencies of the commissioners, Congress required, *inter alia*, magistrates to be members of the bar wherever possible. *See* 28 U.S.C. § 631(b)(1). This was

prompted, in part, to insure "both the accused and the legal system of an independent determination of the question of probable cause." *Id.* at 4256. Congress obviously could have modified § 2510(9) and expressly extended to magistrates the authority to authorize Title III wiretaps. Perhaps it was thought unnecessary in light of the Magistrates Act itself. No time need be spent speculating on this because in 1976 Congress made clear how it desired magistrates to be used in our judicial system.

II

As the legislative history of the 1976 amendments to the Magistrates Act demonstrates, Congress was troubled by a series of court decisions that construed the Magistrate's Act narrowly, stifling the greater use of magistrates by the district courts. *See* H.R.Rep. No. 1609, 94th Cong., 2d Sess. 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6166. The amendments accordingly reorganized the Magistrates Act in an attempt to clarify and further define the additional duties that may be assigned a magistrate. *See Gomez v. United States*, 490 U.S. 858, 867, 109 S.Ct. 2237, 2243, 104 L.Ed.2d 923 (1989). The revised § 636(b) reads, in relevant part, as follows:

> (b)(1) Notwithstanding any provision of law to the contrary--
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> (A) a judge may designate a magistrate *to hear and determine any pretrial matter* pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action.
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> . . . . .

> (3) A magistrate may be assigned *such additional duties* as are not inconsistent with the Constitution and laws of the United States. (Emphasis added).

For purposes of the instant appeal, the two underlined clauses of § 636(b)--the "pretrial matters" and the "additional duties" clause--are in my view the source of authority permitting a magistrate judge to review a wiretap application and authorize its issuance. Of equal importance is the statute's lead-in sentence, that reads: "Notwithstanding any provision of law to the contrary--." Its significance will be addressed first.

This sentence modifies the pretrial matters and additional duties clauses, and was included in order to resolve issues like that presented on this appeal, that is, whether a district judge may validly refer to a magistrate judge a task statutorily assigned to the district judge. As both the Senate and House Judiciary Committees explained:

> The initial sentence of the revised section uses the phrase "notwithstanding any provision of law to the contrary--". This language is intended to overcome any problem which may be caused by the fact that scattered throughout the code are statutes which refer to "the judge" or "the court." It is not feasible for the Congress to change each of these terms to read "the judge or a magistrate." It is, therefore, intended that the permissible assignment of additional duties to a magistrate shall be governed by the revised section 636(b), "notwithstanding any provision of law" referring to "judge" or "court."

S.Rep. No. 625, 94th Cong., 2d Sess. 7 (1976); H.R.Rep. No. 1609, 94th Cong., 2d Sess. 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6169. Given this plain expression of legislative purpose, the language of § 2510(9) is modified by § 636(b) so as to allow a district judge to refer a Title III application to a magistrate judge, provided the referral is

encompassed by a specific authorization in the remainder of § 636(b).

Authority for such reference, it seems to me, falls within the orbit of either the pretrial matters clause or the additional duties clause because overall "[t]he Act is designed to relieve the district courts of certain subordinate duties that often distract district courts from more important matters." *Peretz v. United States*, --- U.S. ---, 111 S.Ct. 2661, 2668, 115 L.Ed.2d 808 (1991); *see also* H.R.Rep. No. 94-1609, 94th Cong., 2d Sess. 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6167 (magistrate is to "assist the district judge in a variety of pretrial and preliminary matters thereby facilitating the ultimate and final exercise of the adjudicatory function at the trial of the case"); S.Rep. No. 92-1065, 92nd Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3350, 3351 (magistrates "render valuable assistance to the judges of the district courts, thereby freeing the time of those judges for the actual trial of cases"); H.R.Rep. No. 1629, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 4252, 4255 (purpose of Act is "to cull from the ever-growing workload of the U.S. district courts matters that are more desirably performed by a lower tier of judicial officers"). The answer to the question now raised hinges therefore on whether the referral is a pretrial matter.

A. *Pretrial Matters*

Under the pretrial matters clause, a magistrate judge may be assigned to "hear and determine any pretrial matter." 18 U.S.C. § 636(b)(1)(A). The district court retains the supervisory power to review the magistrate's determination upon a showing that it "is clearly erroneous or contrary to law." *Id.*; *see also Gomez*, 490 U.S. at 868, 109 S.Ct. at 2244. The amendment to the pretrial matters clause aimed to "clarify the broad authority to refer 'any pretrial matter.' " H.R.Rep. No. 1609, 94th Cong., 2d Sess. 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6169. Only eight categories of

dispositive pretrial motions, which might otherwise fall within the broad range of pretrial matters that could be referred, were excepted. *See* 18 U.S.C. § 636(b)(1)(A).

Referral of a Title III wiretap application is not one of the enumerated exceptions. An ancient maxim of statutory interpretation seems particularly apt in such a circumstance: "*Inclusio unius est exclusio alterius*" (The inclusion of one is the exclusion of another). Thus, it logically follows that since the eight exceptions to the pretrial matters clause did not include Title III wiretap referrals, it was not one of those categories of cases excepted from the broad range of cases that could properly be referred. *See United States v. Diaz*, 922 F.2d 998, 1002 (2d Cir.1990). Absent an affirmative reason to believe the 94th Congress had a different purpose, we should not judicially repeal the authorization to refer effectuated by Congress in 1968 and in 1976.

It is of more than slight significance that arrest warrants and search warrants were among those criminal pretrial matters enumerated in the Committee Report that set forth the types of pretrial matters included within this provision. *See Gomez*, 490 U.S. at 868, n. 16, 109 S.Ct. at 2244 n. 16; H.R.Rep. No. 1609, 94th Cong., 2d Sess. 7, 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6167, 6169. The *ex parte* nature of such individual applications is wholly analogous to the authorization for a wiretap. The notion that a wiretap is somehow more intrusive on personal privacy than an arrest or search warrant, and therefore only to be authorized by an Article III judge, blinks reality.

Concededly, those subject to an arrest or search warrant have notice at the time the intrusion occurs, while the wiretap is secret and without notice. But the knowledge imparted comes about because of the nature of the intrusion, not because there is a view that it constitutes a greater or lesser invasion of an individual's right to privacy than does a wiretap. It might well be said that the execution of an arrest

warrant not only deprives the individual of his or her right to privacy, it also denies to the individual the fundamental right to liberty, making that privacy intrusion greater than that imposed by a wiretap.

Yet, distinctions in Fourth Amendment jurisprudence based on differing levels of intrusiveness are disfavored by the Supreme Court. *See Arizona v. Hicks*, 480 U.S. 321, 325, 107 S.Ct. 1149, 1153, 94 L.Ed.2d 347 (1987) (finding that "[a] search is a search," regardless of its level of intrusiveness). This is because parsing out invasions of privacy tramples on the bright line the Court has attempted to establish in Fourth Amendment law. Hence, privacy cannot serve as a reason to deny a reference to a magistrate judge.

Moreover, and perhaps most importantly, applications for arrest and search warrants regularly call on magistrate judges to make the same probable cause determination that is at the heart of all Title III application decisions. *See* 18 U.S.C. § 2518(3)(a)(b)-(c). Affording district judges the right to delegate this authority to magistrate judges does not therefore construe the pretrial matters clause so as "to include responsibilities of far greater importance than the specified duties assigned to magistrates." *Peretz*, --- U.S. at ---, 111 S.Ct. at 2667; *see also Gomez*, 490 U.S. at 864, 109 S.Ct. at 2241 ("Any additional duties performed pursuant to a general authorization in the statute reasonably should bear some relation to the specified duties."). As such, there is no principled reason to infer that a wiretap application should not fall within the scope of the pretrial matters clause, while an arrest and search warrant should.

Congress, as noted, has ruled that arrest and search warrants are pretrial matters within the meaning of the clause. *See Gomez*, 490 U.S. at 868, n. 16, 109 S.Ct. at 2244 n. 16; H.R.Rep. No. 1609, 94th Cong., 2d Sess. 7, 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6167, 6169. The comparative analysis is not destroyed simply because these

matters are also embraced by § 636(a)(1), which authorizes magistrates to assume all the duties previously held by commissioners. It bears repeating that commissioners were roundly criticized for their handling of those matters, which in itself was a major impetus for the creation of magistrates in the first place.

B. *Additional Duties*

Neither the Magistrates Act nor the cases interpreting the Act are altogether clear on the scope of the pretrial matters clause or the delineation between the pretrial matters and the additional duties clauses. Notwithstanding this murkiness, if the assignment of a Title III application is not a pretrial matter, then it must fall within the catch-all "additional duties" clause.

The government suggests that because no other judge has ever referred an application to a magistrate judge, Judge Korman should be mandamused not to refer such because in so doing he acts beyond his power. This contention, here upheld by my respected colleagues, thwarts Congress' purpose when it included the additional duties clause in the 1976 amendments to the Magistrates Act. Congress sought to encourage experimentation so as to relieve district judges of time-consuming matters that do not require an Article III judge, and that distract such judges from the trying of cases. As the House Judiciary Committee explained:

> This subsection enables the district courts to continue innovative experimentations in the use of this judicial officer. At the same time, placing this authorization in an entirely separate subsection emphasizes that it is not restricted in any way by any other specific grant of authority to magistrates.
>
> Under this subsection, the district courts would remain free to experiment in the assignment of other duties to

> magistrates which may not necessarily be included in the broad category of "pretrial matters".
>
> . . . . .
>
> If district judges are willing to experiment with the assignment to magistrates of other functions in aid of the business of the courts, there will be increased time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties, and a consequent benefit to both efficiency and the quality of justice in the Federal courts.

H.R.Rep. No. 1609, 94th Cong., 2d Sess. 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6172.

Judge Korman describes the burden review of Title III applications places on already overworked district courts.

> Specifically, applications for Title III orders are accompanied by long and prolix affidavits. Review of these applications is often time consuming and the judicial officer's task does not end with his or her signature on the order. After the wire interception is in place, there are periodic reports that require the judicial officer to monitor its progress. Moreover, where relevant conversations are seized, the judicial officer will usually be faced with equally lengthy and prolix renewal applications.

In re U.S. Attorney, 784 F.Supp. 1019, 1027 (E.D.N.Y.1992). Refusing to allow referral of these applications to magistrate judges who are intended to be an extra set of eyes, ears and hands and who already regularly perform similar tasks--many of which require the same determination of whether or not probable cause exists--only undermines the common goal of ensuring thorough monitoring of Title III applications.

The Supreme Court has stamped its imprimatur on a broad interpretation of the additional duties clause consistent with Congress' plan.

> The generality of the category of "additional duties" indicates that Congress intended to give federal judges significant leeway to experiment with possible improvements in the efficiency of the judicial process that had not already been tried or even foreseen. If Congress had intended strictly to limit these additional duties to functions considered in committee hearings or debates, presumably it would have included in the statute a bill of particulars rather than a broad residuary clause.

Peretz, --- U.S. at ---, 111 S.Ct. at 2667. The only limitations placed on this method of testing for improvements in judicial efficiency was expressed by the Court in *Peretz*. First, just as with a supplemental duty under the pretrial matters clause, the delegation of another duty pursuant to the "additional duties" clause cannot "include responsibilities of far greater importance than the specified duties assigned to magistrates." *Peretz*, --- U.S. at ---, 111 S.Ct. at 2667. For the reasons discussed earlier, this limitation is not implicated.

Second, the delegated duty cannot be "inconsistent with the Constitution and laws of the United States." 28 U.S.C. § 636(b)(3). This language cannot preclude a district court's referral of a Title III application to a magistrate simply because of the language of 18 U.S.C. § 2510(9). Some affirmative indication of congressional purpose to prohibit use of a magistrate is required or some conflict with the Constitution must be shown. Any other reading of the statute would render the lead-in language of § 636(b), "notwithstanding any provision of law," superfluous, contravening the norms of statutory construction. *See Freytag v. Commissioner*, --- U.S. ---, ---, 111 S.Ct. 2631, 2638, 115 L.Ed.2d 764 (1991); *Pennsylvania Public Welfare Dept. v. Davenport*, 495 U.S. 552, 563, 110 S.Ct. 2126, 2133, 109 L.Ed.2d 588 (1990).

For example, as the district court in the instant case points out, a jury verdict must under Fed.R.Crim.P. 31 be returned to "a judge." But the legislative history of § 636(b) teaches that the additional duties clause permits magistrates to take a jury verdict "where the trial judge is unavailable." *See In re U.S. Attorney*, 784 F.Supp. at 1026, n. 10. Hence, the word "judge" may not be read consistent with Congress' scheme to exclude "magistrate judge," absent some affirmative indication from the legislature.

Further, the interplay of the Supreme Court's opinions in *Peretz* (allowing district courts to assign jury *voir dire* in a criminal case to magistrates when the parties consent) and *Gomez* (not allowing the foregoing where the parties did not consent) is particularly instructive respecting the scope of the additional duties clause. In *Peretz*, the Court said its holding in *Gomez* was predicated on concern that a magistrate's conducting of jury voir dire without a defendant's consent involved the potential deprivation of a significant constitutional right or privilege. *See Peretz*, --- U.S. at ---, 111 S.Ct. at 2666.

In the instant case, there are no constitutional concerns. The Fourth Amendment requires that the probable cause determination be made by a "neutral and detached magistrate." *See Coolidge v. New Hampshire*, 403 U.S. 443, 453, 91 S.Ct. 2022, 2031, 29 L.Ed.2d 564 (1971). Obviously, the Fourth Amendment is not violated by the delegation of a wiretap application to a magistrate judge. Because the Court found no constitutional impairment in *Peretz*, it "therefore attach[ed] far less importance ... to the fact that Congress did not focus on jury selection as a possible additional duty for magistrates." --- U.S. at ---, 111 S.Ct. at 2667. As in *Peretz*, the absence here of any constitutional difficulty obviates the need to find unambiguous evidence of Congress' design to include Title III applications among the additional duties a district court can refer to a magistrate. *See id.*

III

The government urges that analysis of Congress' intent in this case be guided by the Electronic Communications Privacy Act of 1986, Pub.L. No. 99- 508, 100 Stat. 1848 (codified as amended at 18 U.S.C. §§ 3121-3127 (1988)). This argument fails for several reasons.

To begin with, courts have an unflagging duty to read the laws of the United States in accord with what judges perceive is Congress' scheme, not as judges might prefer. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 447, 107 S.Ct. 1207, 1221, 94 L.Ed.2d 434 (1987); *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32, 102 S.Ct. 38, 42, 70 L.Ed.2d 23 (1981). Thus, we must be guided by what the 94th Congress had in mind when it enacted the 1976 amendments to the Magistrates Act and, to a lesser extent, the plan the 90th Congress had when it enacted Title III and, later in that same session, the original Magistrates Act. To say that the 94th Congress' intent was that Title III applications should not be referred to magistrate judges pursuant to the Magistrates Act because the 99th Congress did not amend 18 U.S.C. §§ 2518(1) and 2510(9) is a weak reed to rely on when construing such comprehensive statutes. That is to say, "it is well settled that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *Russello v. United States*, 464 U.S. 16, 26, 104 S.Ct. 296, 302, 78 L.Ed.2d 17 (1983) (quoting *Jefferson County Pharmaceutical Ass'n v. Abbot Labs.*, 460 U.S. 150, 165 n. 27, 103 S.Ct. 1011, 1021 n. 27, 74 L.Ed.2d 882 (1983)).

Further, even assuming *arguendo* that we should in some sense be guided by what Congress did in 1986, its actions can reasonably be read so as not to conflict with the conclusion that Title III applications can be referred to a magistrate. The 1976 amendments and its inclusion of the "notwithstanding any law to the contrary" language was reflective in effect.

Congress modified all those provisions that referred to "judge" or "court," as it made perfectly plain. Included within that sweep was § 2510(9), as it defined judge of competent jurisdiction in all the *then-existing* provisions of Title III.

Next, when Congress later included the pen register provisions in 1981, it could not simply have said applications must be submitted to a "judge of competent jurisdiction" and referenced § 2510(9), as the government argues. Doing so would have rendered the pen register provisions ambiguous. The reflective 1976 amendments could not logically be read to modify later-enacted provisions of Title III. As a consequence, a new term had to be used with a different definitional section, which included magistrate. Insofar as § 2510(9) pertained to Title III wiretap applications, there was therefore no need to change or amend it; Congress had already changed it in 1976.

In disputing this proposition the government's reliance on *Giordano*, 416 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974), is misplaced. Because the Attorney General's power to delegate authority under 28 U.S.C. § 510 predated Title III, logically § 510 could not modify the unambiguous language of Title III so as to allow the Attorney General to delegate the power to authorize wiretap applications. In analyzing this issue the Supreme Court would focus on Title III because as the later-enacted statute, it was controlling. In contrast, the expanding provisions in both the 1976 amendments and the original Magistrates Act succeed Title III, and as such they control. Hence, the provisions of the 1981 Electronic Communications Act really shed no new light on the controlling statutes. It violates a cardinal rule of construction to view the pen register act of 1986 as repealing the Magistrates Act by implication.

Finally, the government declares that the contrast between the stringent controls placed on wiretap orders versus the

much less onerous requirements for pen register authorizations indicates that Congress thought wiretap orders required the approval of a district judge. It is equally plausible to believe Congress recognized that the use of a pen register--compared to a wiretap--did not implicate the Fourth Amendment. *See Smith v. Maryland*, 442 U.S. 735, 745-46, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979).

CONCLUSION

For the reasons stated, I vote to deny the petition for a writ of mandamus.

APPENDIX B

In re Applications of UNITED STATES ATTORNEY FOR ORDERS PURSUANT TO TITLE III OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968

Misc. No. 92-43.

United States District Court,

E.D. New York.

Feb. 14, 1992.

MEMORANDUM AND ORDER

KORMAN, District Judge.

Pursuant to an administrative order of Chief Judge Platt, I am serving in the Miscellaneous Part from February 10, 1992 to February 23, 1992. One of the duties of the judge assigned to the Miscellaneous Part is the review of applications for electronic eavesdropping orders pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"), 18 U.S.C. §§ 2510-21 (1988). Because it is my intention to refer such applications to a United States magistrate judge, I address here the issue whether the referral of a Title III application to a United States magistrate judge is authorized by the Federal Magistrates Act.

DISCUSSION

The Federal Magistrates Act of 1968, Pub.L. No. 90-578, 82 Stat. 1107, codified as amended at 18 U.S.C. §§ 3401-3402; 28 U.S.C. §§ 631-39 (1988 & Supp. I 1989), abolished the office of United States commissioner and replaced it with a judicial officer serving directly below the level of the district court. Congress imposed significant requirements to ensure the competency and impartiality of

these judicial officers and it gave them significantly--indeed, dramatically--more responsibility than it had previously conferred on United States commissioners.

Congress conferred on magistrates not only all powers formerly exercised by commissioners, it also conferred on magistrates the power to try minor offenses when all parties consent, and to perform such additional duties assigned by the district court as are "not inconsistent with the Constitution and laws of the United States." Federal Magistrates Act of 1968 § 636(b), Pub.L. No. 90-578, 82 Stat. 1108, 1113 (1968). The "additional duties" could include, but were not restricted to

> (1) service as a special master in an appropriate civil action, pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts;
>
> (2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; and
>
> (3) preliminary review of applications for post-trial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing.

Id.

The experience under former section 636(b) demonstrated that magistrates were fulfilling their intended function of assisting "the district judge to the end that the district court judge could have more time to preside at the trial of cases." H.R.Rep. No. 1609, 94th Cong., 2nd Sess. 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6166. Congress was disturbed, however, by a series of cases that construed former section 636 in a manner that limited the "additional duties"

that could be conferred on magistrates. *See e.g. Wingo v. Wedding*, 418 U.S. 461, 94 S.Ct. 2842, 41 L.Ed.2d 879 (1974); *T.P.O. v. McMillen*, 460 F.2d 348 (7th Cir. 1972); *Ingram v. Richardson*, 471 F.2d 1268 (6th Cir. 1972). Accordingly, former section 636(b) was rewritten in 1976 to restate and clarify "the Congressional intention that the magistrate should be a judicial officer who, not only in his own right but also under general supervision of the court, shall serve as an officer of the court in disposing of minor and petty criminal offenses, in the preliminary or pretrial processing of both criminal and civil cases, and in hearing dispositive motions and evidentiary hearings when assigned to the magistrate by a judge of the court." H.R.Rep. No. 1609, 94th Cong., 2d Sess. 5 (1976), *reprinted in* 1976 U.S.Code Cong. & Admin. News 6162, 6165.

There are two clauses of the revised section 636(b) that are particularly relevant to the issue whether an application for an eavesdropping order may be referred to a United States magistrate judge: The "pretrial matters" clause and the "additional duties" clause. An analysis of the language and legislative history of these two clauses, which were enacted after the Omnibus Crime Control and Safe Streets Act of 1968, provides compelling support for referral of these applications to a United States magistrate judge.

A. *The "Pretrial Matters" Clause*

The "pretrial matters" clause of the Federal Magistrates Act provides that, "[n]otwithstanding any provision of law to the contrary ... any pretrial matter pending before the court," except for certain dispositive motions, may be referred to a United States magistrate judge. 28 U.S.C. § 636(b)(1)(A). Because this clause is applicable to *ex parte* proceedings that take place prior to the commencement of a criminal case, *United States v. Diaz*, 922 F.2d 998 (2d Cir.1990), the principal objection to the referral of an application for a Title III order to a United States magistrate judge derives from the

fact that these judicial officers are not among the judges of competent jurisdiction in whom Congress explicitly vested the authority to issue such orders--namely, judges of the United States district courts and the courts of appeals.[1] 18 U.S.C. §§ 2510(9)(a) and 2516(1).

Of some relevance to this objection is *United States v. Giordano*, 416 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974). There at issue was 18 U.S.C. § 2516(1), as originally enacted, which empowered the "Attorney General or any Assistant Attorney General specially designated by the Attorney General" to "authorize an application to a federal judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications" by federal investigative agencies. Omnibus Crime Control and Safe Streets Act of 1968 § 2516(1), Pub.L. No. 90-351, 82 Stat. 197, 216 (1968).[2] Relying on 28 U.S.C. § 510, which authorized the delegation of "any function of the Attorney General" to "any other officer" or "employee" of the Department of Justice, the Solicitor General argued that

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[1] Section 2516(1) of Title III provides:

> The Attorney General, Deputy Attorney General, Associate Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a *Federal judge of competent jurisdiction* for, and such judge may grant ... an order authorizing or approving the interception of wire or oral communications ...

18 U.S.C. § 2516(1). Section 2510(9)(a) defines "federal judge of competent jurisdiction" as "a judge of the United States district court or a United States court of appeals."

[2] In 1986, Congress amended § 2516(1) to expand the list of officials to whom the Attorney General could delegate the authority to make applications for eavesdropping orders. *See* note 1, *supra*.

the power to authorize a Title III application could be delegated by the Attorney General to a subordinate other than an Assistant Attorney General. In rejecting this argument, the Supreme Court wrote:

> Despite § 510, Congress does not always contemplate that the duties assigned to the Attorney General may be freely delegated. Under the Civil Rights Act of 1968, for instance, certain prosecutions are authorized only on the certification of the Attorney General or the Deputy Attorney General, "which function of certification may not be delegated." 18 U.S.C. § 245(a)(1). Equally precise language forbidding delegation was not employed in the legislation before us; but we think § 2516(1), fairly read, was intended to limit the power to authorize wiretap applications to the Attorney General himself and to any Assistant Attorney General he might designate. This interpretation of the statute is also strongly supported by its purpose and legislative history.

416 U.S. at 514, 94 S.Ct. at 1826.

The conclusion the Supreme Court reached in *Giordano* could arguably apply to the question whether the authority to issue eavesdropping orders, which Title III vests in judges of the United States District Court and the United States Court of Appeals, may be delegated to United States magistrate judges. Such an extension of the holding in *Giordano*, however, could not be reconciled with two critical aspects of the Federal Magistrates Act. Unlike 28 U.S.C. § 510, the Federal Magistrates Act was adopted after the enactment of Title III and it contains a clause that permits the delegation of specified authority vested in district court judges *notwithstanding* any existing law to the contrary. More significantly, a careful analysis of the legislative history demonstrates that the failure of Congress to include United States magistrate judges among the judges authorized to issue Title III orders does not provide a sufficient basis for inferring that Congress

intended to preclude the delegation of that responsibility pursuant to the subsequently enacted Federal Magistrates Act.

The Organized Crime Control and Safe Streets Act of 1968 and the Federal Magistrates Act of 1968 were enacted by the 90th Congress. A common thread running through both is the finding of Congress that defects in the commissioner system had undermined the competence, integrity and professionalism of the United States commissioners. Commissioners were paid under a fee system according to the number and nature of the matters they handled; many served only on a part-time basis; one third of commissioners were nonlawyers; most commissioners were required to use their own resources to meet the expenses of their office; commissioners received little guidance in performing their duties; and commissioners were grossly underpaid and were subject to removal without cause, making it difficult to attract qualified applicants. H.R.Rep. No. 1629, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 4252, 4255-56; McCabe, The Federal Magistrates Act of 1979, 16 Harv.J.Legis. 343, 347 (1979).

The sorry state of the commissioner system was summed up by Senator Tydings during the course of the debates leading to the passage of the Federal Magistrates Act:

> One's first impression, Mr. President, is that it is certainly less than a happy situation that a person who has not been admitted to the bar--and who therefore, has no trial experience, and probably little if any familiarity with the Federal Rules of Criminal Procedure or with the rules of evidence--should be permitted to discharge responsibilities that call for the exercise of trained legal judgment. The decisions that commissioners must routinely make often involve some of the most difficult points of constitutional law, which the best lawyers and judges are hard pressed to apply correctly.

Senator Tydings continued that, when reviewing an application for a search or arrest warrant, "a U.S. commissioner may be the only judicial officer in a position to insure that individual rights are not disregarded by overzealous prosecutors. Yet ... it appears in many instances the action of the Commissioner may be little more than a rubber stamp of the application of the complaining officer."[3] Subsequently, testimony taken by the Senate Judiciary Subcommittee on Improvements in Judicial Machinery established that "[i]n many districts search warrants and arrest warrants are handled on a mass production basis with no independent judicial determination being made as to whether probable cause exists for the issuance of a warrant." Memorandum Prepared by the Staff of the Subcomm. on Improvements in Judicial Machinery, April 28, 1966, *reprinted in* 1966-67 Senate Hearings at 9.

The Omnibus Crime Control and Safe Streets Act addressed this problem by specifically providing that "a judge of the United States district court or a United States court of appeals" could entertain applications for Title III orders made by federal law enforcement officers. In explaining this clause, the Senate Judiciary Committee observed that, although "existing practice permitted United States Commissioners and city mayors to issue search warrants," that practice was "too permissive for the interception of wire or oral communications." S.Rep. No. 1097, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2179. The Federal Magistrates Act, which was enacted shortly thereafter, addressed the problem more directly by abolishing

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[3] Remarks of Hon. Joseph D. Tydings, on the Floor of the Senate, October 15, 1965, *reprinted in* Federal Magistrates Act: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess. & 90th Cong., 1st Sess. 6, 7 (1966 & 1967) [hereinafter "1966-67 Senate Hearings"].

the office of United States commissioner and creating the office of United States magistrate. Echoing the sentiments voiced in the legislative history of Title III, the House Judiciary Committee explained that one of its primary concerns was that "[c]ommissioners in many districts grant[ed] search and arrest warrant applications perfunctorily, thereby depriving both the accused and the legal system of an independent determination of the question of probable cause." H.R.Rep. No. 1629, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 4252, 4256.

To rectify this problem, Congress created the office of United States magistrate, thereby increasing "the overall efficiency of the federal judiciary while at the same time providing a higher standard of justice at the point where many individuals first come into contact with the courts." H.R.Rep. No. 1629, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 4252, 4257.[4] These judicial officers are appointed by a majority of the judges of the district court for a term of eight years, and may be removed only for cause. 28 U.S.C. §§ 631(e) and (i). Congress not only set certain minimum qualifications, it also expressly provided that a United States magistrate be selected pursuant to standards and procedures promulgated by the Judicial Conference of the United States. Such standards and procedures must "contain provision for public notice of all vacancies in magistrate positions and for the establishment by the district courts of merit selection panels, composed of residents of individual judicial districts, to assist the courts in identifying and recommending persons who are best qualified to fill such positions." 28 U.S.C. § 631(b)(5). The standards promulgated by the Judicial Conference require that the selection of

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[4] The possibility of transferring the commissioners' responsibilities to district court judges was considered and rejected by the Subcommittee on Improvements in Judicial Machinery. 1966-67 Senate Hearings at 238-39 (Remarks of Senator Tydings).

United States magistrate judges be made from a list of nominees (up to five for each vacancy) who have been found by the merit selection panel to "possess the same types of personal and professional qualities expected of district judges."[5]

The Federal Magistrate Act also abandons the fee system and provides that United States magistrates may not engage in the practice of law or any other business "inconsistent with the expeditious, proper and impartial performance of their duties as judicial officers." 28 U.S.C. § 632(a).[6] United States magistrates today receive a salary close to that of district court judges, which cannot be reduced during their term in office, 28 U.S.C. § 634(a) and (b), and are provided with law clerks to assist them in their work. Administrative Office of the United States Courts, *Legal Manual: United States Magistrates* § 1.10. Indeed, in 1990, Congress changed the title of these judicial officers to "United States magistrate judge" in order to "reflect more accurately the responsibilities and duties of the office." Judicial Improvements Act of 1990 § 321, Pub.L. No. 101-650, 104 Stat. 5089, 5117 (1990); H.R.Rep. No. 734, 101st Cong., 2d

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[5] Administrative Office of the United States Courts, The Selection and Appointment of United States Magistrates 10, 12-13 (1987). The procedure for reappointment requires the establishment of a similar panel, which reviews the incumbent's performance, considers comments from members of the bar and public, and submits a recommendation to the district court. *Id.* at 14-16.

[6] The Act discourages the use of part-time magistrates and permits their appointment only where "employment of a full-time magistrate would not be feasible or desirable." 28 U.S.C. § 63(a)(3). Part-time magistrates, who are appointed to a four-year term, are prohibited from serving "as counsel in any criminal action in any court of the United States." 28 U.S.C. § 632(b).

Sess. 31 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6877.

The lesson to be drawn from this legislative history is that the referral of an eavesdropping application to a United States magistrate judge does not implicate any of the concerns underlying Title III's facially restrictive definition of judges who are competent to issue eavesdropping orders. The office of United States commissioner, at which that definition was directed, no longer exists; and the concerns about the competence and professionalism of those serving as United States commissioners do not apply to those serving as United States magistrate judges. Indeed, United States magistrate judges enjoy tenure, compensation and independence comparable to that of many state judges who today issue orders pursuant to Title III.[7]

Moreover, it is not material that, after it enacted the Federal Magistrates Act, Congress failed to confer on United States magistrate judges the authority to entertain a Title III application. While Congress clearly contemplated that United States magistrate judges would perform other functions that were vested in United States district court judges, the assumption was that these duties could be referred to a United States magistrate judge if they came within the broad grant of

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[7] In New York State, Supreme Court Justices and County Court Judges are authorized by Title III to issue eavesdropping orders. 18 U.S.C. § 2510(9); N.Y.Crim.Proc.Law § 700.05(4) (McKinney 1984). Supreme Court Justices are elected for 14 year terms, N.Y.Const. Art. 6, § 6(c) (McKinney 1987), and County Court Judges are elected for ten year terms, N.Y. County Law § 400(1) (McKinney 1991). Their reelection depends on currying favor of party leaders or the vagaries of the electoral process, and their compensation is substantially less than that of United States magistrate judges.

delegable authority specified in 28 U.S.C. § 636(b).[8] Indeed, Congress rewrote Section 636(b) in 1976 to overcome a crabbed judicial construction of the Federal Magistrates Act and to make plain its intent to override any inconsistency that may derive from the fact that a delegable duty within the scope of the clause is vested in a "judge" or a "court." As the Senate Judiciary Committee Report explained:

> The initial sentence of the revised section uses the phrase "notwithstanding any provision of law to the contrary--". This language is intended to overcome any problem which may be caused by the fact that scattered throughout the code are statutes which refer to "the judge" or "the court." It is not feasible for the Congress to change each of those terms to read "the judge or a magistrate." It is, therefore, intended that the permissible assignment of additional duties to a magistrate shall be governed by the revised section 636(b), "notwithstanding any provision of law" referring to "judge" or "court."

S.Rep. No. 625, 94th Cong., 2d Sess. 7 (1976); H.R.Rep. No. 1609, 94th Cong.2d Sess. 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6169.

Particularly apposite here is the recent holding of the Court of Appeals for the Second Circuit that the empaneling of a grand jury may be referred to a United States magistrate judge even though the Jury Selection Service Act confers such authority only on "[t]he Chief Judge of the District Court, or such other district court judge as the [the district's jury

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[8] Congress did amend Fed.R.Crim.P. 41 to substitute United States magistrate for United States commissioner as one of the judicial officers authorized to issue search warrants. Federal Magistrates Act of 1968 § 301, Pub.L. No. 90-578, 82 Stat. 1108, 1115 (1968). This contemporaneous amendment of Rule 41 was necessitated by the fact that the Federal Magistrates Act abolished the office of United States commissioner.

selection] plan may provide...." 28 U.S.C. 1865(a) (1988). *United States v. Diaz*, 922 F.2d at 1002. In an opinion by Judge Kearse, the Court of Appeals held that "the apparent limitation in the Jury Act is overridden by [the "pretrial matters" clause,] 28 U.S.C. § 636(b)(1)(A)." *Id.* at 1002.

The "pretrial matters" clause, it will be recalled, provides that "[n]otwithstanding any provision of law to the contrary ... a judge may designate a magistrate to hear and determine any pretrial matter pending before the court," except for eight specified dispositive motions. 28 U.S.C. § 636(b)(1)(A). Because "[t]he selection and empaneling of a grand jury are not among the tasks expressly excluded from this authorization, and they plainly occur prior to any part of the trial," the Court of Appeals concluded that "[o]n its face ... § 636(b)(1)(A) appears to authorize delegation of the pretrial functions of grand jury selection and empaneling to a magistrate." *Diaz*, 922 F.2d at 1002.

The Court of Appeals then examined the legislative history of section 636(b)(1)(A), which made no reference to the delegation of such authority to a magistrate. Based on other pretrial and preliminary matters that Congress clearly contemplated could be referred to a United States magistrate judge, the Court of Appeals found that it was unlikely that Congress meant to withhold from that judicial officer the authority to empanel grand juries. *Diaz*, 922 F.2d at 1004. The same legislative history demonstrates that Congress contemplated that the issuance of search warrants, among other pre-indictment matters, would fall within the ambit of the "pretrial matters clause." *See* H.R.Rep. No. 1609, 94th Cong. 2d Sess. 7, 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6167-69.

While electronic eavesdropping is potentially more invasive of privacy than ordinary searches and seizures, and while Congress was unwilling to entrust to United States commissioners the responsibility of determining whether either of

these intrusions should take place, it is unlikely that Congress intended that the same judicial officer it found competent to issue a warrant to arrest a person, to ransack his house, and seize his most private papers, be denied the authority to entertain a motion for electronic eavesdropping upon the referral of a district court judge. Under these circumstances, there is no more reason here than in *Diaz* to deny full effect to the overriding language of the "pretrial matters" clause.

B. *The "Additional Duties" Clause*

One of the 1976 amendments to section 636(b) created a separate subsection providing that "a magistrate may be assigned such additional duties as are not inconsistent with the Constitution and the laws of the United States." 28 U.S.C. § 636(b)(3). The House Judiciary Committee emphasized the expansive nature of this "catchall" clause:

> A similar provision is contained in the existing legislation. This subsection enables the district courts to continue innovative experimentation in the use of this judicial officer. At the same time, placing this authorization in an entirely separate subsection emphasizes that it is not restricted in any way by any other specific grant of authority to magistrates.
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> . . . . .
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> If district judges are willing to experiment with the assignment to magistrates of other functions in aid of the business of the courts, there will be increased time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties, and a consequent benefit to both efficiency and the quality of justice in the Federal courts.

H.R.Rep. No. 1609, 94th Cong. 2d Sess. 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6172; S.Rep. No. 625, 94th Cong., 2d Sess. 10-11 (1976). This expansive expression of congressional intent is echoed in a number of subsequent

Supreme Court decisions. Most recent among these is *Peretz v. United States*, --- U.S. ---, 111 S.Ct. 2661, 2671, 115 L.Ed.2d 808 (1991), in which it was held that "permitting a magistrate to conduct the *voir dire* in a felony trial when the defendant raises no objection is entirely faithful to the congressional purpose in enacting and amending the Federal Magistrates Act." The Court added:

> The generality of the category of "additional duties" indicates that Congress intended to give federal judges significant leeway to experiment with possible improvements in the efficiency of the judicial process that had not already been tried or even foreseen. If Congress had intended strictly to limit these additional duties to functions considered in the committee hearings or debates, presumably it would have included in the statute a bill of particulars rather than a broad residuary clause.

Id., 111 S.Ct. at 2667.[9]

There are two interrelated limitations on the "additional duties" clause that distinguish it from the "pretrial matters" clause. The first, which appears in the text of the clause, is that the delegation of a duty not be "inconsistent" with the laws of the United States. The second, which derives from the gloss the Supreme Court has placed on the clause, is that

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[9] Among the duties that have been referred to magistrates under the "additional duties" clause are the review of social security cases for report and recommendation to the district court judge, *Mathews v. Weber*, 423 U.S. 261, 96 S.Ct. 549, 46 L.Ed.2d 483 (1976), the taking of a guilty plea, *United States v. Khan*, 774 F.Supp. 748 (E.D.N.Y.1991), the determination of a motion to quash a grand jury subpoena, *In re Grand Jury Proceedings Dzikowich*, 620 F.Supp. 521 (D.C.Wis.1985), and the issuance of an order granting immunity to a witness and compelling the witness to testify in the grand jury. *In re Grand Jury Appearance of Cummings*, 615 F.Supp. 68 (D.C.Wis.1985).

the delegated duty not be of "far greater importance" than specified duties that may be assigned to magistrates. *Peretz*, 111 S.Ct. at 2667.

The delegation of a Title III application to a United States magistrate judge is not inconsistent with Title III merely because the latter provides that judges of the United States district courts may issue eavesdropping orders. Any case to which the "additional duties" clause may be applicable will also involve the delegation of some duty that is vested initially in a judge. Accordingly, it would frustrate the intent of Congress if a nonadjudicatory responsibility could not be delegated to a United States magistrate judge *merely* because that responsibility is specifically conferred on a district court judge. Unless the language or legislative history clearly indicates that Congress did not intend to authorize the delegation of a particular duty, this circumstance alone should not preclude delegation under the "additional duties" clause.[10] *See United States v. Khan*, 774 F.Supp. 748, 753-54 (E.D.N.Y.1991); *In re Grand Jury Appearance of Cummings*, 615 F.Supp. at 71.

The preceding discussion has shown that the facially restrictive definition of judges competent to issue Title III orders was not written for the purpose of denying United

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[10] This conclusion is implicit in the legislative history of section 636(b)(3). Specifically, the House Judiciary Committee suggested that the additional duties clause would permit magistrates "to accept returns of jury verdicts where the trial judge is unavailable," even though Fed.R.Crim.P. 31 provides that a jury verdict shall be returned to "the judge" in open court, and Fed.R.Crim.P. 25 provides that, if a judge becomes disabled during the course of trial, "any other judge regularly sitting in or assigned to the court ... may proceed with and finish the trial." *See* H.R.Rep. No. 1609 (1976), 94th Cong., 2d Sess. 12, *reprinted in* 1976 U.S.C.C.A.N. 6162, 6172; *United States v. Arnoldt*, 947 F.2d 1120, 1123 (4th Cir.1991).

States magistrate judges the authority to issue such orders. Moreover, it is equally clear that the consideration of such applications is not of far greater importance than the duty these judicial officers perform in overseeing the procedural mechanism that "is central to the Fourth Amendment,"--namely, the antecedent determination whether a search or arrest warrant should issue. *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 272, 80 S.Ct. 1463, 1468, 4 L.Ed.2d 1708 (1960) (separate opinion of Brennan, J.).

The findings that must be made by a United States magistrate judge when issuing a search warrant differ only marginally from those which must be made by a judicial officer who issues an electronic eavesdropping order.[11] Before issuing an eavesdropping order, a judicial officer must determine that there is probable cause to believe that incriminating conversations relating to certain specified offenses will be intercepted and that comparable evidence cannot be obtained through the use of other investigative procedures. 18 U.S.C. § 2518(3)(a), (b) and (c). Similar findings of fact must be made by a United States magistrate judge before authorizing the kinds of significant invasions of privacy for which the Fourth Amendment requires a search warrant. A United States magistrate judge must not only determine that there is probable cause to believe that a crime has been committed and that evidence of criminal activity will be found on the premises to be searched, the magistrate also "must judge the reasonableness of every warrant in light of the circumstances

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[11] *Cf. In re Grand Jury Proceedings Dzikowich*, 620 F.Supp. at 524 (holding that a magistrate has authority to determine a claim of illegal electronic surveillance brought pursuant to 18 U.S.C. § 3504, and noting that such determination is "similar to the reviewing of documentation for search warrants in which magistrates engage on a regular basis."); 18 U.S.C. §§ 3122(a) and 3127(2)(A) (1988) (authorizing a magistrate judge to order the installation of pen registers and trap and trace devices).

of the particular case, carefully considering the description of evidence sought, the situation of the premises, and the position and interests of the owner or occupant." *Zurcher v. Stanford Daily*, 436 U.S. 547, 570, 98 S.Ct. 1970, 1984, 56 L.Ed.2d 525 (1978) (Powell J., concurring).[12] Fed.R.Crim.P. 41 expressly singles out one such circumstance and requires a United States magistrate judge to consider whether a requisite showing of cause has been made to permit a search to be conducted during nighttime hours. Moreover, where a search implicates First Amendment values, special obligations devolve on the magistrate to ensure that the requirements of the Fourth Amendment are applied with "scrupulous exactitude," *Stanford v. Texas*, 379 U.S. 476, 485, 85 S.Ct. 506, 511, 13 L.Ed.2d 431 (1965); *Zurcher*, 436 U.S. at 564, 98 S.Ct. at 1980, and to consider the First Amendment values at stake, "as well as the societal interest in enforcing the criminal laws." 436 U.S. at 571, n.3, 98 S.Ct. at 1984, n.3 (Powell, J., concurring).

While the ultimate determination whether to issue a Title III order or to permit its renewal requires judgments comparable to those made in issuing search warrants, the burden of considering these applications makes it a particularly appropriate duty to assign to United States magistrate judges. Specifically, applications for Title III orders are accompanied by long and prolix affidavits. Review of these applications is often time consuming and the judicial officer's task does not end with his or her signature on the order. After the wire interception is in place, there are periodic reports that require the judicial officer to monitor its progress. Moreover, where relevant conversations are seized, the judicial officer will usually be faced with equally lengthy and prolix renewal

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[12] Justice Powell cast the deciding vote in *Zurcher*. The views expressed in his concurring opinion, although somewhat more explicit, are consistent with the majority opinion in which Justice Powell joined.

applications. The referral of these applications by district court judges will plainly further the congressional objective of making increased "time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties," and increase the "efficiency and the quality of justice in the Federal courts." H.R.Rep. No. 1609, 94th Cong. 2d Sess. 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6172; S.Rep. No. 625, 94th Cong., 2d Sess. 10-11 (1976).[13]

The only remaining question presented is whether Article III of the United States Constitution precludes authorization of a wire interception by a magistrate. Recent Supreme Court decisions have upheld the delegation of certain adjudicatory responsibilities to magistrates. *United States v. Raddatz*, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980) (motion to suppress evidence); *Peretz v. United States*, --- U.S. ---, 111 S.Ct. 2661, 115 L.Ed.2d 808 (1991) (jury selection). These cases rested on the availability of *de novo* review by the district court judge and, in *Peretz*, the parties' consent. While *de novo* review by a United States district court judge is available here,[14] neither such review nor the

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[13] In 1990, United States district court judges authorized 324 wire interceptions and granted 333 extensions. These figures have been increasing consistently, primarily as a result of an increase in drug investigations. Administrative Office of the United States Courts, Report on Applications for Orders Authorizing or Approving the Interception of Wire, Oral, or Electronic Communications 1, 9 (1991).

[14] The United States Attorney may obtain review of a denial of a Title III order by appealing to the district court judge who referred the application to the United States magistrate judge. The exhaustion of this process would not preclude an application to another district court judge if the initial application was ultimately denied. Of course, the *ex parte* nature of the proceeding precludes pre-authorization review at the behest of the subject of the intercep-

consent of the parties is necessary, because the authorization of a wiretap falls within the category of nonadjudicatory functions that need not be performed by an Article III judge. *See Mistretta v. United States*, 488 U.S. 361, 389-90 n. 16, 109 S.Ct. 647, 663-64 n. 16, 102 L.Ed.2d 714 (1989) (noting that the issuance of search warrants and the review of wiretap applications are among the nonadjudicatory functions performed by Article III judges).

An eavesdropping order is sought at an investigatory stage, in a nonadversarial context. In reviewing a wiretap application, a magistrate is not resolving a dispute between two parties, but rather is interposing his neutral and detached judgment so that prosecutors and law enforcement officials are not the sole judges of when to use constitutionally sensitive law enforcement techniques. *See United States v. United States District Court for Eastern Dist.*, 407 U.S. 297, 316-17, 92 S.Ct. 2125, 2136-37, 32 L.Ed.2d 752 (1972). While the authorizing officer cannot be subject to the control of the Executive Branch, the Fourth Amendment does not require that such officer be endowed with all of the attributes of an Article III judge:

> The substance of the Constitution's warrant requirement does not turn on the labeling of the issuing party. The warrant traditionally has represented an independent assurance that a search and arrest will not proceed without probable cause to believe that a crime has been committed and that the person or place named in the warrant is involved in the crime. Thus, an issuing magistrate must meet two tests. He must be neutral and detached and he

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tion. An aggrieved party, however, may obtain review of the validity of the order by a district court judge in a subsequent judicial proceeding, 28 U.S.C. § 2515, although not all aspects of such review can accurately be described as *de novo*. *See Illinois v. Gates*, 462 U.S. 213, 236, 103 S.Ct. 2317, 2331, 76 L.Ed.2d 527 (1983).

must be capable of determining whether probable cause exists for the requested arrest or search.

Shadwick v. Tampa, 407 U.S. 345, 350, 92 S.Ct. 2119, 2123, 32 L.Ed.2d 783 (1972). A United States magistrate judge plainly meets these "two tests." Indeed, the fact that a sitting United States Magistrate judge is subject to removal for cause and reappointment by the same United States district court judges who review eavesdropping orders (if they are later challenged at suppression hearings) operates to ensure that he will fulfill properly the special responsibilities with which he has been entrusted. *Cf. United States v. Karathanos*, 531 F.2d 26, 34 (2d Cir.), *cert. denied*, 428 U.S. 910, 96 S.Ct. 3221, 49 L.Ed.2d 1217 (1976).

CONCLUSION

Accordingly, for the foregoing reasons, the United States Attorney's applications for wire interception orders pursuant to Title III are referred to the United States magistrate judge during the period from today until February 23, 1992 and from October 5, 1992 until October 18, 1992 when I will next serve in the Miscellaneous Part. I am prepared to entertain an application to stay this order to permit the United States Attorney to take such steps as he may deem appropriate if he disagrees with my conclusions. *See In re United States*, 903 F.2d 88 (2d Cir. 1990).

SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of February on[e] thousand nine hundred and ninety-four.

IN RE: USA

DOCKET NUMBER: 93-3074

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellant USA.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,
GEORGE LANGE III, Clerk
By:
/s/
Carolyn Clark Campbell
Chief Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 23rd day of November, one thousand nine hundred and ninety-three.

In Re: UNITED STATES OF AMERICA,

Petitioner

Docket No. 93-3074

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IN THE MATTER OF THE APPLICATION OF THE UNITED STATES FOR AN ORDER AUTHORIZING THE INTERCEPTION OF WIRE AND ELECTRONIC COMMUNICATIONS, ETC...

Before: Hon. Wilfred Feinberg, Hon. Richard J. Cardamone and Hon. Frank X. Altimari, CJJ

A Petition for a Writ of Mandamus having being filed by the United States Government and oral argument having been heard,

Upon consideration thereof, it is

ORDERED that the Writ of Mandamus be and it hereby is GRANTED in accordance with the opinion of this Court.

Further ordered that respondent Hon. Edward R. Korman, USDJ shall not delegate review of Title III applications to federal magistrate judges and to review personally an application now pending.

FOR THE COURT,
ELAINE B. GOLDSMITH, Clerk
By:

/s/
Edward J. Guardaro
Staff Attorney

APPENDIX E

A. Title III of the Omnibus Crime Control and Safe Streets Act of 1968:

18 U.S.C. § 2510. Definitions

* * *

(9) "Judge of competent jurisdiction" means –

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire, oral, or electronic communications; * * *

18 U.S.C. § 2516. Authorization for interception of wire, oral or electronic communications

(1) The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any actingAssistant Attorney General, or any Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federaljudge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications * * *.

B. Electronic Communications Privacy Act of 1986:

18 U.S.C. § 3127. Definitions for chapter

* * *

(2) the term "court of competent jurisdiction" means –

(A) a district court of the United States (including a magistrate of such a court) or a United States Court of Appeals; or

(B) a court of general criminal jurisdiction of a State authorized by the law of that State to enter orders authorizing the use of a pen register or a trap and trace device; * * *

C. Federal Magistrates Act:

28 U.S.C. § 636. Jurisdiction, powers, and temporary assignment

* * *

(b)(1) Notwithstanding any provision of law to the contrary –

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A)

where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(b)(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.